

---

# **General Counsel's Supplemental Report**

**January 1, 2004 – March 26, 2004**

## **Public Employment Relations Commission**

**Robert E. Anderson  
General Counsel**

**Don Horowitz  
Deputy General Counsel**

---

### **Appeals From Commission Decisions**

One appeal was withdrawn and another one dismissed.

### **Commission Regulations**

At its February 26, 2004 meeting, the Commission proposed the readoption of Chapter 10 of its regulations, with some amendments. The proposal will be published in the April 5 edition of the New Jersey Register and the public will have until June 5 to submit comments. The Commission's proposal includes changes permitting the use of faxes and e-mail attachments for certain filings.

### **Other Court Cases**

#### **Grievance Procedures**

In *Mulholland v. Morristown Police Dept.*, App. Div. Dkt. No. A-5916-02T1 (2/9/04), the Court held that a patrol officer could not begin a civil action until he had exhausted the grievance procedure covering him. The officer claimed that his contractual rights to overtime had been improperly suspended for 20 days.

### **Bi-State Agencies**

The New Jersey Supreme Court has denied a petition for certification in *In re Alleged Improper Practice Under Section XI, Paragraph A(d) of the Port Authority Labor Relations Instruction, IP 98-16, 17 & IP 99-2*, App. Div. Dkt. No. A-1160-02T5 (10/31/03).

That case is discussed on p. 10 of the annual report.

### **Termination**

In *Crespo v. Evergo Corp.*, \_\_ N.J. Super. \_\_\_, 2004 N.J. Super. LEXIS 61 (App. Div. 2004), the Court dismissed an illegal alien's discriminatory termination claim under the Law Against Discrimination. The Court held that the Immigration Reform and Control Act of 1986 precluded the plaintiff from recovering either economic or non-economic damages based on her claim that she was discriminatorily denied the opportunity to return to work as a warehouse employee after giving birth; the Court stressed that the plaintiff's claims arose solely from her termination and not from aggravated sexual harassment or other egregious circumstances.

In *Mele v. Federal Reserve Bank of New York*, \_\_ F.3d \_\_\_, 2004 U.S. App. LEXIS 3491 (3d Cir. 2004), the employer fired a facilities engineer. The engineer claimed that his termination violated the employer's Management Guide to Personnel Policies, but the Court held that the Federal Reserve Act precludes enforcement of an employment contract that would compromise the statutory

power of a federal reserve bank to dismiss employees at pleasure.

In *Division of State Police v. Schmidlin*, App. Div. Dkt. No. A-6341-01T2 (3/16/04), the Court held that a state trooper was denied fair discovery in a disciplinary proceeding that led to his termination for allegedly trying to buy illegal steroids and then covering up that attempt. The trooper requested discovery of the investigation file of the Division of Criminal Justice; that file included material concerning a confidential informant whose hearsay statements provided critical evidence against the trooper. The superintendent denied the trooper access to the file based on the assurance of the prosecutor investigating potential criminal charges that the file did not contain any exculpatory information. The Court held that this delegation of authority was an inadequate and unacceptable approach to the discovery request and remanded to allow the trooper to seek full discovery and to move either for a new hearing or the reopening of the previous hearing.

### **Discipline**

In *Ganges v. Burlington Cty.*, App. Div. Dkt. No. A-5433-02T1 (2/02/04), the

Court held that a corrections captain was entitled to a trial court's *de novo* review of a three-day suspension for insubordination. (An earlier decision in this case is described in the annual report at p. 13). The captain had a constitutional right to a trial because no statute, regulation, or collective bargaining agreement accorded him an administrative procedure for appeal or review of the disciplinary action. "[P]rinciples of fundamental fairness and due process dictate that such public employees be provided judicial *de novo* review of the disciplinary action in the Law Division. This ruling simply assures that all disciplined public employees are provided an appropriate and meaningful appeal procedure." (Slip opinion at p. 8). This holding may apply to all forms of discipline where a public employee cannot arbitrate a grievance or appeal by right to the Merit System Board or other governmental body.

In *FOP Lodge #1 Camden v. City of Camden*, \_\_ N.J. Super. \_\_\_, 2003 N.J. Super. LEXIS 415 (Law Div. 2003), Judge Orlando held that N.J.S.A. 40:14-147 applies to police officers in civil service municipalities who face minor disciplinary charges. An accused officer is entitled to written notice of the

charges, disclosure of supporting evidence, and an opportunity to respond in writing. If the facts are disputed, an accused officer also has rights to be represented by counsel and to call and cross-examine witnesses. Further, a hearing officer's determination is subject to *de novo* review in Superior Court. Judge Orlando enjoined the City from using its procedure for minor disciplinary actions because it did not allow representation, cross-examination, or calling one's own witnesses.

#### CEPA

By a 4-3 vote, the Supreme Court has affirmed an Appellate Division decision reinstating a verdict on compensatory damages in a CEPA case and remanding for a new trial on punitive damages. *Hernandez v. Montville Tp. Bd. of Ed.*, 354 N.J. Super. 467 (App. Div. 2002), *aff'd* \_\_ N.J. \_\_ (2004). An elementary school custodian was terminated after he reported and attempted to discuss clogged toilets that were overflowing for prolonged periods, causing feces and urine to spill on the floor, and an exit sign that was unlit for seven days due to a burned out bulb. The trial court granted judgment for the school board, notwithstanding the verdict, because it believed the plaintiff's case was based on

trivial incidents. The Appellate Division reinstated the verdict, concluding that the plaintiff reasonably believed the unsanitary bathroom conditions and unlit exit sign violated health and safety rules and a clear mandate of public policy and that the plaintiff was terminated for blowing the whistle on these violations rather than the pretextual reasons given by the board. The Supreme Court affirmed in a per curiam opinion voted for by Justices Long, Zazzali, and Albin and by Judge Conley, temporarily assigned. Justice LaVecchia wrote a dissenting opinion, joined by Chief Justice Poritz and Justice Verniero, in which she argued that the custodian's idiosyncratic responses to occasional operational problems did not constitute the type of "illegal activity, policy or practice" rendered actionable under *N.J.S.A. 34:19-3a*.